IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JASON ALLEN SEVERSON, Appellant.	)	No. 63134-9-I DIVISION ONE UNPUBLISHED OPINION FILED: June 14, 2010

Leach, A.C.J. — During closing arguments in Jason Severson's trial for three counts of rape of a child in the third degree, the prosecutor told the jury that "red herrings" had been used by fugitives in the past to get bloodhounds off their trail and to "escape the law." He proceeded to address defense counsel's arguments, calling each of them a "red herring." Severson appeals his convictions for two counts of rape of a child, arguing that the prosecutor's remarks were improper and denied him a fair trial. We agree that some of the prosecutor's remarks were improper. But because Severson has not shown a substantial likelihood that they affected the verdict, we affirm.

FACTS

Based on allegations that Severson had sex with three different 14-year-old girls, the State charged him with three counts of rape of a child in the third degree.[1]

[1] A fourth charge involving a fourth girl was dismissed on the State's motion

During the trial and closing arguments, the defense challenged the victims' credibility, pointing out inconsistencies in their stories. Severson did not testify.

In the rebuttal portion of his closing argument, the prosecutor argued as follows:

> Ladies and gentleman, we've been at this for about a week and a half now, I'm not going to take up a lot more of your time, but there is one concept I did want to address before you retire to the jury room. Many of you have probably heard of the term red herring. A lot of people don't know where it comes from, but red herrings are actually these little red smelly fish. In the 18th century, fugitives used to take them and wipe them on trails as they were trying to escape the law, and the blood hounds would go after them, and fugitives would get away. That's where the term red herring came from, and what you just heard was a series of red herrings from the defense. Mr. Warner's doing his best, he doesn't have a lot to work with, and so he's throwing everything he can at a wall.
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> [DEFENSE COUNSEL]: Objection, your Honor.
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> THE COURT: Overruled.
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> [PROSECUTOR]: . . . Let's look at some of the things that defense counsel just said, and we can actually peel the onion apart and see where the flaws are, the herrings.

The prosecutor proceeded to discuss the defense arguments, calling each a "red herring."

The jury acquitted Severson on one count and convicted him on the other two. He appeals.

DECISION

The sole issue on appeal is whether the prosecutor committed misconduct during closing argument.[2] To establish misconduct, a defendant must demonstrate

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prior to trial.

both the impropriety of the prosecutor's remarks and their prejudicial effect.[3] Reversal is required only when there is a substantial likelihood the remarks affected the verdict.[4] Applying these principles here, we conclude that while some of the prosecutor's remarks were improper, Severson has not shown a substantial likelihood that they affected the verdict.

Severson contends the prosecutor's remarks were misconduct because they "cast defense counsel as someone trying to trick jurors into acquitting Severson." We agree. While a prosecutor may comment disparagingly on a defense *argument,*[5] it is improper to disparage defense *counsel* or argue in a manner that impugns counsel's integrity.[6] Thus, arguments directly or indirectly suggesting that defense counsel is

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[2] It is questionable whether this issue is reviewable. Absent a "*proper* objection" and request for a curative instruction, alleged misconduct is not reviewable unless it was so flagrant and ill-intentioned that the prejudice could not have been cured by an instruction. State v. Padilla, 69 Wn. App. 295, 300, 846 P.2d 564 (1993) (emphasis added); State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978). "[A]n objection must be sufficiently specific to inform the trial court and opposing counsel of the basis for the objection." Padilla, 69 Wn. App. at 300. Here, defense counsel gave no basis for his objection. This was arguably insufficient, and the court could have overruled the objection for that reason. If the objection was insufficient, the issue is not reviewable because the prosecutor's remarks were not so flagrant and ill-intentioned as to be incurable.

[3] State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

[4] Brown, 132 Wn.2d at 561.

[5] Brown, 132 Wn.2d at 566; State v. Graham, 59 Wn. App. 418, 429, 798 P.2d 314 (1990).

[6] State v. Reed, 102 Wn.2d 140, 145-46, 684 P.2d 699 (1984) (improper to urge jury not to be swayed by defendant's "city lawyers"); State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008) (improper to argue that all defense attorneys mischaracterize evidence and twist the facts), cert. denied, ___ U.S. ___, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009); State v. Gonzales, 111 Wn. App. 276, 283-84, 45 P.3d 205 (2002) (improper to argue that, unlike defense lawyers, prosecutors take an oath "to see that justice is served"); State v. Negrete, 72 Wn. App. 62, 66-67, 863 P.2d 137 (1993)

trying to fool or trick the jury are generally improper because they tend to impugn counsel's character.[7] Here, the prosecutor's initial remarks regarding the alleged history of the term "red herring" and defense counsel's desperate situation were improper because they implied that counsel was trying to trick the jury so that Severson could "escape the law." And, contrary to the State's assertions, defense counsel's attack on the veracity of its witnesses did not invite the prosecutor's remarks or render them a fair response. The remarks were completely unjustified, and we strongly disapprove of them. Nevertheless, Severson has not shown, and the record does not demonstrate, a substantial likelihood the remarks affected the verdict.

The improper remarks were brief. And the prosecutor thereafter focused his argument on the merits, rather than the motives, of the defense. Although he continued to refer to the defense arguments as "herrings," he defined "herrings" as "flaws" in those arguments and did not again return to the initial improper theme. Thus, viewed in their entirety, the prosecutor's remarks focused more on the merits of the defense than on the integrity of defense counsel. In addition, the court instructed the jury that the attorneys' remarks were not evidence and that they must disregard any remark, statement, or argument that was not supported by the law or the evidence. We presume that juries follow the court's instructions.[8]

In these circumstances, and in light of the jury's acquittal on one of the counts,

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(improper to argue that defense counsel is being paid to twist the words of a witness).

[7] Warren, 165 Wn.2d at 29; Negrete, 72 Wn. App. at 66-67.

[8] State v. Southerland, 109 Wn.2d 389, 391, 745 P.2d 33 (1987).

there is no substantial likelihood the remarks affected the verdict.[9]

Affirmed.

Leach, A.C.J.

Ellington, J.

Cox, J.

[9] See Warren, 165 Wn.2d at 29-30 (remarks disparaging defense attorneys in general and calling defense argument a "classic example of taking these facts and completely twisting them . . . and hoping that you are not smart enough to figure out what in fact they are doing" were not so flagrant and ill-intentioned as to be incurable); Negrete, 72 Wn. App. at 66 (remark that defense counsel "is being paid to twist the words of the witnesses" was curable); Lindgren v. Lane, 925 F.2d 198, 204 (7th Cir.1991) (single reference to defense counsel's argument being the "tricks" and "illusions" of a "magician" was not so egregious as to warrant habeas relief).